

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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BRITISH AUTO PARTS, INC.,

*Appellant,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Appellee.*

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On Appeal from an Order  
of the United States District Court for the  
Central District of California

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## BRIEF FOR APPELLEE

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FILED

FEB 16 1968

WM. B. LUCK, CLERK

FEB 20 1968



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# United States Court of Appeals

FOR THE NINTH CIRCUIT

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No. 21,883

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BRITISH AUTO PARTS, INC.,

*Appellant,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Appellee.*

---

On Appeal from an Order  
of the United States District Court for the  
Central District of California

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BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

This case is here on appeal from an order (R. 102-103),<sup>1</sup> of the United States District Court for the Central District of California granting the Board's application for enforcement of

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<sup>1</sup> "R." refers to the transcript of record.

a subpoena *duces tecum* directed to British Auto Parts, Inc. ("the Company") pursuant to Section 11(2) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*). In the alternative to its application for subpoena enforcement and as the second count of its complaint, the Board sought issuance of a mandatory injunction under 28 U.S.C., Sec. 1337, directing the Company to comply with an election rule promulgated by the Board pursuant to Section 9(c) of the Act. The jurisdiction of this Court is invoked under 28 U.S.C., Secs. 1291 and 1294.

#### A. Proceedings before the Board

On March 17, 1966, the Union<sup>2</sup> filed a petition pursuant to Section 9(c)(1) of the Act, seeking to represent a unit of the Company's employees at its plant in Gardena, California (R. 94; 7a). On April 12, 1966, the Regional Director approved a stipulation for Certification upon Consent Election entered into by the Company and the Union providing for the conduct of a consent election in accordance with the Act, "the Board's Rules and Regulations, and the applicable procedures and policies of the Board" (R. 94; 7a-7b).

One of the Board's election rules in effect at the time the parties entered into the stipulation for a consent election requires that an employer file with the Regional Director a list of the names and addresses of all its employees eligible to vote in the representation election within 7 days after the Regional Director's approval of a consent election agreement or after the close of the determinative payroll period for

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<sup>2</sup> General Warehousemen, Local Union No. 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

eligibility purposes, whichever is later (R. 7g). The Regional Director then makes the list available to all parties in the representation proceeding in order to promote the communication of election issues to the employees and to aid in challenging the ballots of employees believed to be ineligible to vote (R. 7h-7l). An employer's failure to file the required list of employee names and addresses constitutes grounds for setting aside the election whenever proper objections are filed (R. 7g).

On April 19, 1966, the Company filed with the Regional Director an election eligibility list containing the names of its employees, but omitting their addresses as required by the rule (R. 95). On May 2, 1966, an election was conducted in which 3 employees voted for the Union and 4 employees voted against (*Ibid.*). The Board, however, sustained the Union's objection to the election based on the Company's refusal to furnish the required list, set the election aside, and directed that another election be held<sup>3</sup> (R. 95; 7r-7y).

On August 4, 1966, the Regional Director notified the Company that the second election was to be held on September 12, and requested that a list of the employees' names and addresses be filed no later than August 11, 1966 (R. 95; 7y). The Company again failed to file the list, and at the request of the Union, the election was postponed (R. 95). On October 3, the Regional Director issued a subpoena *duces tecum* directing the Company to provide the Regional Director with the Company's personnel and payroll records or, in lieu thereof, with the required list (R. 96; 72). The Company, however, refused to comply with the subpoena or otherwise furnish the list.

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<sup>3</sup> The Board's order (R. 7t-7w) is reported at 160 NLRB No. 40.

## B. Proceedings in the District Court

The Board filed a complaint in the District Court for enforcement of the subpoena, or, alternatively, for a mandatory injunction directing the Company to comply with the Board's rule (R. 1-7). Jurisdiction was predicated on Section 11(2) and 9(c) of the Act and on 28 U.S.C., Sec. 1337. The District Court issued findings of fact and conclusions of law on March 31, 1967, holding that it had jurisdiction both to enforce the Board's subpoena and to issue a mandatory injunction compelling direct obedience with the rule. Accordingly, on the same date, the Court entered an order compelling production of the materials sought in the subpoena and required by the rule (R. 93-103).

## ARGUMENT

### I.

#### THE *EXCELSIOR* RULE IS VALID AND PROPER

### A. Reasons for the Board's Rule

On February 4, 1966, the Board issued its decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (R. 7c-7q), promulgating a new election rule requiring employers to file with the Board's Regional Director, prior to the conduct of a representation election, a list of the names and addresses of the employees eligible to vote in the election and providing that the Regional Director shall then make the list available to all parties to the proceeding (R. 7g-7h).

The considerations that led the Board to adopt the *Excelsior* rule are set forth in its decision (R. 7h-7l). In discharging the trust delegated by Congress in Section 9 of the Act, the Board recognized its obligation "to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice" (R. 7h). See *General Shoe Corporation*, 77 NLRB 124, 126-127. The Board observed that one of the elements that "undoubtedly tends to impede such a choice is a lack of information with respect to one of the choices available"; in other words, that "an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice" (R. 7h). See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 46, 92 (1964).

Under its previous rules, the Board determined, employees frequently did not have an effective opportunity to hear the arguments on all sides before being called upon to cast their votes in a representation election. The Board found that "as a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation" (R. 7h-7i). But the Board found that a labor organization, lacking these advantages, "has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a

result, employees are often completely unaware of that point of view" (R. 7i).<sup>4</sup>

Assuming the existence of other means by which a labor organization "might be able to communicate with a substantial portion of the electorate," the Board held that "access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters" (R. 7h-7i). "In other words," the Board stated, "by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against union representation" (*ibid.*).

The Board further found that employee names and addresses are not readily available from sources other than the employer. Although the "names of some employees may be secured with the assistance of sympathetic fellow employees, . . . this method may not yield the names and addresses of a major proportion of the total employee complement . . . in a large plant or store, where many employees are unknown to their fellows" (R. 7i).<sup>5</sup> Moreover, there are frequently

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<sup>4</sup> The Board noted that union organizers normally have no access to plant premises (*N.L.R.B. v. Babcock and Wilcox*, 351 U.S. 105) and that, under the Board's former election rules, labor organizations were not entitled to a list of the employees' home addresses (R. 7h). Although the Board's former rules required that "an employer, shortly before an election, make available for inspection by the parties and the Regional Director a list of employees claimed by him to be eligible to vote in that election," there was "no requirement that this list contain addresses in addition to names" (R. 7g).

<sup>5</sup> For example, the Board noted that in *May Department Stores Co.*, 136 NLRB 797, 808, enf. denied, 316 F. 2d 797 (C.A. 6), after some 20 months of organizational effort, the union possessed names and addresses of only 1,250 out of approximately 3,000 eligible voters (R. 7i, n. 11).

employees who are temporarily absent from the employee complement (on layoff, sick leave, leave of absence, or military leave), eligible to vote yet unknown to their fellow employees, and still others who are known to their fellows only by first names and nicknames. "Finally, all the foregoing difficulties are compounded by the more or less constant turnover in the employee complement of any employer" (R. 22-23). See *Employment and Earnings Statistics for the United States, 1909-66*, pp. 45-48 (BLS Bulletin 1312-4).

"In sum," the Board concluded, "not only does knowledge of employee names and addresses increase the likelihood of an informed employee choice for or against representation, but, in the absence of employer disclosure, a list of names and addresses is exceedingly difficult if not impossible to obtain. Accordingly, as we have stated, we shall in the future regard an employer's refusal to make a prompt disclosure of this information as tending to interfere with prospects for a fair and free election" (R. 7j).

In addition, the Board determined that its new rule would reduce the number of challenged ballots and challenge proceedings by promoting advance settlement of questions of voting eligibility and by obviating the need for union challenges based solely on ignorance of the voter's identity (R. 7k-7e). Thus, the Board also concluded that "the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation" (R. 7l).<sup>6</sup>

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<sup>6</sup> In fiscal 1966, the Board closed 8,324 representation proceedings in which elections were conducted and the results certified. See *31st Annual Report of the NLRB, 1966*, p. 203 (Table 11A).

**B. The Board's adoption of the *Excelsior* rule is within its broad statutory authority to establish reasonable rules and procedures for the conduct of representation elections.**

Some 20 years ago, the Supreme Court was asked to determine the validity of the Board election rule that excludes as untimely post-election challenges to the eligibility of voters. The Court prefaced its determination with the following statement (*N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 330-331):

As we have noted before, Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees . . . . In carrying out this task, of course, the Board must act so as to give effect to the principle of majority rule set forth in Section 9(a), a rule that "is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions." . . . It is within this democratic framework that the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily. [Citations to cases and legislative history omitted.]

The Court found that the Board's rule was "a justifiable and reasonable adjustment of the democratic process," which had its reflection in the procedures followed in other electoral contests (*id.*, at 333). Thus, the Court stated (*id.*, at 331):

Indeed, unless such adjustments are made, the democratic process may be perverted and the

election may fail to reflect the will of the majority of the electorate. One of the commonest protective devices is to require that challenges to the eligibility of voters be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality. In political elections, this device often involves registration lists which are closed some time prior to election day; all challenges as to registrants must be made during the intervening period or at the polls.

Thereafter, it is too late . . . . This rule is universally recognized as consistent with the democratic process. And it is generally followed in corporate elections. The Board's adoption of the rule is therefore in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives.

Applying these standards, the Courts of Appeals for the Fourth and Seventh Circuits have recently upheld the validity of the Board's *Excelsior* rule. *N.L.R.B. v. Hanes Hosiery Division, Hanes Corp.*, 384 F. 2d 188 (C.A. 4), pet. for cert. pending, No. 982, this term; and *N.L.R.B. v. Rohlen*, 385 F. 2d 52 (C.A. 7).<sup>7</sup> As the Court observed in *Rohlen*, "The

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<sup>7</sup> Several district courts, including the court below, have also affirmed the validity of the *Excelsior* rule. *N.L.R.B. v. Wyman-Gordon Co.*, 270 F. Supp. 280 (D. Mass.), appeal pending (No. 7,000, C.A. 1); *N.L.R.B. v. Teledyne, Inc.*, 66 LRRM 2408 (N.D. Cal.), appeal pending, (No. 22,354, C.A. 9); *N.L.R.B. v. Mid-States Metal Products Co.*, 64 LRRM 2060, 2187 (E.D. Mich.); *N.L.R.B. v. Beech-Nut Life Savers, Inc.*, 274 F. Supp. 432 (S.D. N.Y.); *Swift & Co. v. Solien*, 274 F. Supp. 953 (E.D. Mo.); *N.L.R.B. v. Q-T Shoe Co.*, 67 LRRM 2356 (D. N.J.).

two-pronged purpose of the rule is to make certain that employees are able to exercise an informed and reasoned choice after hearing all sides of the question concerning the desirability of union representation and to eliminate the time-consuming process of investigating challenges to voter eligibility on the eve of elections solely because of a lack of knowledge of voters' identity." 385 F. 2d at 55. The rule is thus consonant with procedures long approved and enforced in other electoral contests. *Hanes, supra*, 384 F. 2d at 191.

c. **The Company's claim that the *Excelsior* rule is arbitrary and capricious is without merit**

Turning to the "arguments against imposing a requirement of disclosure" — arguments which the Company repeats here — the Board determined that they "are of little force, especially when weighed against the benefits resulting therefrom" (R. 71).

The Company undertakes to attack *Excelsior* on behalf of its employees, alleging that the rule invades their privacy. The Company claims that most of its employees asserted a desire to be left alone by failing to send their names and addresses to the Regional Director after the election had been directed, despite the fact that it had supplied them with stamped, pre-addressed envelopes for that purpose (Br. 27-28). Such inaction by the employees, however, cannot properly be construed as an affirmative declaration that they do not want the union to know who they are and where they live.

In any event, their failure to send in their names and addresses is immaterial. Many employees who would not themselves take the initiative in securing literature from a union

because of inertia, fear of employer reprisal, or an initial disposition to vote against union representation, are nonetheless interested in hearing what a union has to say in the period just before an election in which they are directly concerned. The Board's rule simply gives unions an opportunity to reach employees; it does not compel employees to read union literature mailed to them or to discuss unions with fellow employees or union representatives who might come to their homes for that purpose. The statutory good served by giving employees an opportunity to become more informed about the choice before them outweighs the minor inconvenience caused those employees who are determinedly disinterested in the election and who must, therefore, throw away a few additional items of unwanted mail or turn away an unwelcome visitor.<sup>8</sup> As stated by the Court in *Swift & Co. v. Solien*, *supra*, 274 F. Supp. at 958:

[The employer] attempts to champion and protect what it deems to be the right of its employees to make "uninformed choices." Significantly, it is the employer, not the employees, who attempts to . . . protect that "right." The employees may well have

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<sup>8</sup> *Cf. Wheeler v. Sorenson Mfg. Co.*, 65 LRRM 2408, 2409-2410 (Ky. App.), holding that an employer did not violate his employee's right of privacy by printing and distributing to other employees photographs of her pay check, showing the number of hours she worked, gross wages, deductions, and "take home" pay, in the course of justifying his pay scales and urging employees not to support a union; and *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880 (S.D. N.Y.), dismissing an action brought on behalf of New York motor vehicle registrants alleging that their right of privacy was invaded by sale of the state registration records to the "highest responsible bidder" for commercial purposes.

such a right (as by voluntarily closing their eyes, ears and doors to proffered information), but the choice of whether to exercise that right should be theirs, not the employer's. It is, of course, true that the *Excelsior* rule, which facilitates communication with the employees does not guarantee a fully informed electorate any more than the availability of water to a horse will assure that he will drink, but the Board has the right to be concerned that the decision by the employees should, if possible, be an informed and reasoned one.<sup>9</sup>

Nor is there substance to the contention that the *Excelsior* rule is invalid because it subjects employees to the danger of harassment and coercion in their homes. As the Board stated in *Excelsior* (R. 7m):

We cannot assume that a union, seeking to obtain employees' votes in a secret ballot election, will engage in conduct of this nature; if it does, we shall provide an appropriate remedy. [Footnote omitted.] We do not, in any event, regard the mere possibility that a union will abuse the

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<sup>9</sup> See also, *N.L.R.B. v. Wolverine Industries Division, Mid-States Metal Products, Inc.*, *supra*, 64 LRRM at 2061 ("It is true that the members of the unions . . . may go to the homes of the employees and try to sell them on their positions. I would hate to say that I had so little faith in the intelligence of the average man that I should close his ears to that kind of approach or make it difficult for others to reach him in that way. I think your average citizen is a pretty . . . intelligent, independent and courageous man, and if he doesn't want to hear what the UAW or UMW has to say, he can quickly turn his back").

opportunity to communicate with employees in their homes as a sufficient basis for denying this opportunity altogether. See *Martin v. City of Struthers*, 319 U.S. 141; *Staub v. City of Baxley*, 335 U.S. 313.

The Supreme Court held in the cases cited that a community that attempts to protect its citizens from door-to-door solicitations and distributions of literature by banning or placing prior restraints on this conduct, acts in violation of the First Amendment. In so holding, the Court pointed out that the opportunity to make such visits is important to the free expression of ideas, that some people welcome these visits, and that those who feel otherwise are free to turn the visitors away and have the protection of the law in doing so (319 U.S. at 143-149). The Company's attempt to exercise this privilege in behalf of its employees by denying the unions access to them is surely entitled to no more deference than the efforts of communities to protect their citizens from "nuisance" visits in the case cited above.<sup>10</sup> See also *Public Utilities Commission v. Pollak*, 343 U.S. 451.

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<sup>10</sup> In *N.A.A.C.P. v. Alabama*, 357 U.S. 449, cited by the Company (Br. 25-26), the Supreme Court held that "compelled disclosure of [NAACP's] Alabama membership is likely to affect adversely the ability of [NAACP] and its members to pursue their collective effort to foster beliefs they admittedly have the right to advocate, in that it may induce members to withdraw from [NAACP] and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure [in a hostile atmosphere]." 357 U.S. at 462-463. Compelled production of the *Excelsior* list properly gives rise to none of these fears, for such a list simply identifies those employed by the Company and tells nothing about their beliefs or associations.

The Company also contends that to require it to comply with the *Excelsior* rule would deprive it of a contract right to keep its employees' addresses confidential (Br. 28-29). Initially, the record fails to support the Company's claim to such a contract right. The Company requires all of its employees to fill out an employment application form containing a printed provision assuring the employee that all information in the form will remain confidential.<sup>11</sup> Thus, confidentiality is not bargained for by the employees, but rather imposed by the Company. But even if confidentiality were the bargained-for contract right of the employees, it is clear that the Company lacks sufficient standing to champion such a right in its employees' behalf. See, e.g., *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459.

In any event, assuming the Company has standing to champion its employees' "contract right" to confidentiality, such a defense must be rejected since, as the District Court found (R. 99):

The employees' interest [in confidentiality is] insubstantial and subject to abridgment by a clearly proper administrative rule promulgated for purposes of holding a fair election. See, e.g., *Addyston Pipe Steel Co. v. United States*, 175 U.S. 211, 228 (1899).<sup>12</sup>

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<sup>11</sup> It is a basic rule of evidence that the mere fact that a communication is made in confidence does not create a recognized privilege against disclosure. See 8 *Wigmore Evidence*, Sec. (3d ed., 1940), and cases there cited.

<sup>12</sup> See also, *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 337.

Equally without merit is the contention that employees will be deprived of their statutory right to refrain from union activities if union proponents are given an opportunity to visit employees in their homes before the election (Br. 29-31). An employee is not deprived of his right to refrain from union activity because a union is given the opportunity to urge him to vote for union representation, any more than he is deprived of his right to engage in union activity when his employer urges him to vote against the union. So long as the employee is not subjected to intimidating pressures in his contacts with employer or union, the discussion of election issues forwards rather than hinders the ultimate expression of employee free choice. See *Mead-Atlanta Paper Co.*, 120 NLRB 832, 834; *Tuttle & Kift*, 122 NLRB 848-849; *Crane Carrier Corp.*, 122 NLRB 206, 207-208. As the Board stated in *Excelsior* (R. 7m), "an employee's failure to provide a union with his name and address . . . is not, as we view it, an exercise of the Section 7 right to refrain from union activity. Rather, in the context with which we are here concerned — a Board-conducted representation election — an employee exercises this right by voting for or against union representation."

Thus, the purpose of the *Excelsior* rule is to enable employees to hear the arguments on all sides so that they may make a "more fully informed and reasoned choice" in Board elections (R. 7h). If hearing the Union's arguments leads a majority of the employees to vote for union representation, then that result is the proper one under democratic election processes. It is compelled, not by the Board's election rule, but by employee free choice. What the Company seeks to preserve, in the name of employee rights, is the advantage it enjoys in being able to make antiunion speeches to the employees on the job and to mail campaign literature to them at home, while denying the Union the opportunity of similar communications through the mails or home visits.

The Company also urges that *Excelsior* should be rejected because the Board determined that an employer's failure to make prompt disclosure of employee names and addresses tends to interfere with prospects for a fair and free election without establishing as a predicate for such a determination that no alternate channels of communication are open to the Union. Contrary to the Company's contention, the decisions of the Supreme Court in *N.L.R.B. v. Babcock & Wilcox*, 351 U.S. 105, and *N.L.R.B. v. United Steelworkers (Nutone, Inc.)*, 357 U.S. 357, require no such result. In those cases, the right of union representatives to organize on plant premises and of employees to distribute literature in the plant and engage in union activities during working time was measured against the employer's significant interest in controlling the use of his property and the working time of his employees. Accordingly, the existence of alternate means of communication with employees was deemed a relevant consideration in striking the balance between these substantial, conflicting interests.<sup>13</sup>

"Here, as we have shown, the employer has no significant interest in the secrecy of employee names and addresses. Hence, there is no necessity for the Board to consider the existence of alternative channels of communication before requiring disclosure of that information." *Excelsior* (R. 7n).

The Board in establishing the *Excelsior* rule, noted that employers are assured of the opportunity to communicate

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<sup>13</sup> *May Department Stores Co. v. N.L.R.B.*, 316 F. 2d 797 (C.A. 6), may be similarly distinguished. That case "was also concerned with an employer's right to refuse access to its plant property. [There,] . . . the employer had addressed the employees on company premises and on company time. The union request in *May* approached a demand for 'equal time'. These facts are totally unrelated to those here [presented]." *N.L.R.B. v. Rohlen*, 274 F. Supp. 715, 718 (N.D. Ill.), affirmed, 385 F. 2d 52 (C.A. 7).

with the entire employee electorate in the plant and through the mails and that labor organizations, lacking these avenues of communication, have no such assurance. It was primarily to insure the employees access to the arguments of both sides prior to an election that the Board established the *Excelsior* rule, giving all election participants the means to reach all eligible voters. However, contrary to the Company's assertion, the Board's rule does not rest on the assumption that an imbalance of opportunity for communication exists in every case. On the contrary, the Board in *Excelsior* assumed that, on occasion, parties outside the employment relation might be able to communicate with the employees by various means without possessing their home addresses (R. 7i, 7n).<sup>14</sup> But to guarantee full access, the Board established a rule of uniform application for expeditious settlement of questions of employee representation that gives all parties an opportunity to reach the entire electorate, without sacrifice of any substantial employer interest. Accordingly, "even assuming the availability of other avenues by which a union *might* be able to communicate with employees, . . . [the Board] may properly require employer disclosure of employee names and addresses so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election." *Excelsior* (R. 7n).

Moreover, even if the employer were assumed to have a legitimate interest in non-disclosure, the subordination of that interest required by the *Excelsior* rule would be limited to a situation in which employee interests in self-organization are shown to be substantial. For whenever an election is directed (the precondition to disclosure), the Regional Director has

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<sup>14</sup> The Board noted, however, the inadequacy of the channels of communication normally open to unions. See R. 71, n. 10.

found that a real question concerning representation exists.<sup>15</sup> Thus, *Babcock* and *Nutone* may be distinguished from the instant case on the further ground that the opportunity to communicate sought there was not limited to situations in which employee organizational interests were substantial (R. 7n-7o).

Finally, both *Babcock* and *Nutone* dealt with the circumstances under which the Board might find an employer to have committed an unfair labor practice in violation of Section 8 of the Act. The resolution of that issue depends on considerations substantially distinguishable from those presented here in determining the reasonableness of the Board's holding that the disclosure of employee names and addresses is one of the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees" under Section 9. *Excelsior*, quoting *N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 330 (R. 70). See *N.L.R.B. v. Shirlington Supermarket, Inc.*, 224 F. 2d 649, 652-653 (C.A. 4), cert. denied, 350 U.S. 914. As the District Court stated in *N.L.R.B. v. Rohlen*, *supra*, 274 F. Supp. 715, 718, affirmed, 385 F. 2d 62 (C.A. 7):

In addition, all of the above cases [*Babcock*, *Nutone*, and *May*] involved charges of unfair labor practices under Section 8 of the Act, and to find that the company was guilty of an unfair labor

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<sup>15</sup> The Regional Director's finding is dependent on a showing by the petitioning union that 30 percent of the eligible voters support it. A union would be ill-advised to petition for representation simply to obtain the *Excelsior* list; if it withdrew its petition after obtaining the list, it would face under Board rules a 6-month ban on the processing of another representation petition (R. 7n).

practice it was necessary . . . first to find that the company's conduct in denying access to its property "seriously impeded union organization." In determining whether organization was "seriously impeded," the availability of alternate means of communication was an important consideration. We are not concerned with an unfair labor practice, but rather how best the Board may carry out its responsibility to conduct and supervise a representation election. The availability of alternate means of communication should not prohibit the Board from establishing procedures more likely to guarantee an adequate and effective exchange of thought.

In sum, the Board decided in *Excelsior* to raise election standards by providing all participating parties with the means to reach all eligible voters. That determination was made in furtherance of objectives that Congress has entrusted to the Board alone. It was neither arbitrary nor capricious, but a valid and reasonable exercise of Board discretion, entitled to affirmance here.

## II.

### THE DISTRICT COURT PROPERLY ENFORCED THE BOARD'S SUB- POENA UNDER SECTION 11 OF THE ACT.

Section 11 of the Act provides in relevant part:

For the prupose of all hearings and investigations which, in the opinion of the Board, are necessary

and proper for the exercise of the powers vested in it by section 9 [certification of employee representatives] and section 10 [prevention of unfair labor practices] —

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses of the production of any evidence in such proceeding or investigation requested in such application . . . .

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its members, agents or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question . . .

As noted above, when the Company continued in its refusal to comply with the Board's *Excelsior* rule, the Regional Director caused a subpoena *duces tecum* to be served on the

Company directing it to produce the company books and payroll records, or an eligibility list in lieu thereof, containing the names and addresses of all employees eligible to vote in the election (R. 96; 72). The Company petitioned to revoke the subpoena and the Board denied its petition (R. 96). Upon the Company's continued refusal to comply, the Board brought action in the District Court seeking enforcement of the subpoena in the first count of its complaint, pursuant to Section 11(2) of the Act (R. 2-7).

The "scope of permissible judicial inquiry in deciding whether such an application [for subpoena enforcement] should be granted or denied . . . is extremely limited."

*N.L.R.B. v. C. C. C. Associates, Inc.*, 306 F. 2d 534, 538 (C.A. 2). Duly issued subpoenas are entitled to enforcement subject only to the requirements that the Board is acting within its statutory authority in a general class of proceeding that it is empowered to conduct, that the subpoena is not unreasonably burdensome, and that the information sought is not "plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509.<sup>16</sup>

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<sup>16</sup> See *N.L.R.B. v. C. C. C. Associates*, *supra*, 306 F. 2d at 538; *N.L.R.B. v. Friedman*, 352 F. 2d 545, 547 (C.A. 3); *D. G. Bland Lumber Co. v. N.L.R.B.*, 177 F. 2d 555, 557-558 (C.A. 5); *Hamilton v. N.L.R.B.*, 177 F. 2d 676, 677 (C.A. 9); *Cudahy Packing Co. v. N.L.R.B.*, 117 F. 2d 692, 694 (C.A. 10); *N.L.R.B. v. United Aircraft*, 200 F. Supp. 48, 50-51 (D. Conn.), *aff'd per curiam*, 300 F. 2d 442 (C.A. 2); *N.L.R.B. v. Gunaca*, 135 F. Supp. 790, 795-796 (E.D. Wisc.), *aff'd*, 230 F. 2d 542 (C.A. 7), vacated as moot, 353 U.S. 902. See also, *U.S. v. Powell*, 379 U.S. 48, 57-58; *Adams v. F. T. C.*, 296 F. 2d 861, 866 (C.A. 8); *U.S. v. Feaster*, 376 F. 2d 147 (C.A. 5), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 88 S. Ct. 237.

The Board's statutory authority under Section 9 to conduct representation investigations, regulate elections, and certify election results is unquestionable, as is its power to subpoena documents in aid of these authorized functions. *N.L.R.B. v. Duval Jewelry Co.*, 357 U.S. 1; *N.L.R.B. v. Northern Trust Co.*, 148 F. 2d 24, 27 (C.A. 7), cert. denied, 326 U.S. 731. The subpoena sought to be enforced in the present case was issued in a properly instituted representation proceeding to aid the Board in determining the question of representation presented, under conditions designed to promote a "free and reasoned" employee choice. The ultimate question to be resolved in the proceeding before the Board is whether an informed employee electorate will select one of the participating unions as collective bargaining representative in a fair election. A list of the names and addresses of employees eligible to vote in the election, which is to be made available to all parties for the purpose of communicating election issues and determining eligible voters, is clearly relevant to the resolution of that ultimate issue. *N.L.R.B. v. Rohlen*, *supra*, 385 F. 2d at 57 (C.A. 7); *N.L.R.B. v. Hanes Hosiery*, *supra*, 384 F. 2d 188.

The Company challenges the District Court's enforcement of the subpoena on the ground that the employees' names and addresses are not evidence within the meaning of Section 11 of the Act. But the term "evidence" under this section of the statute has not been limited to formal proof of disputed facts presented in a trial-type hearing. Rather, Section 11 has been broadly construed to permit the Board to subpoena data reasonably relevant and helpful in the performance of its statutory duties at the investigative, as well as at the hearing, stage of its proceedings. The Board, in its investigation of questions of representation and supervision of elections, has been permitted to subpoena payroll and employment records to determine, *ex parte*, such internal

administrative matters as whether the employees had a sufficient interest in union representation to warrant the holding of an election, and more generally, “[a]s an aid to the Board in conducting the election and determining who were eligible to vote” (*Cudahy Packing Co. v. N.L.R.B.*, 117 F. 2d 692, 693 (C.A. 10), affirming, 34 F. Supp. 53, 56, 59 (D. Kan.)). See *N.L.R.B. v. Northern Trust Co.*, 56 F. Supp. 335, 336 (N.D. Ill.), aff’d, 148 F. 2d 24 (C.A. 7), cert. denied, 326 U.S. 731; *N.L.R.B. v. Menaged*, 193 F. Supp. 135, 136-137 (D. Md.); *N.L.R.B. v. New England Transportation Co.*, 14 F. Supp. 497, 498, 499 (D. Conn.).<sup>17</sup>

Moreover, both the language of the statute and the legislative history of Section 11 warrant the conclusion that Congress intended to give the Board access to all records relevant to the performance of its delegated function of investigating questions of representation under Section 9 of the Act. The preamble of Section 11 provides that the subpoena powers enumerated shall be “for the purpose of all hearings and investigations which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 . . . .” This

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<sup>17</sup> Cf. *N.L.R.B. v. Groendyke Transport, Inc.*, 372 F. 2d 137, 141-142 (C.A. 10), cert. denied, 387 U.S. 932, where the court held that the Board may conduct a representation election by mail ballot. As the District Court observed, “Implicit in that decision is the holding that the Board may require an employer to furnish the addresses of its employees for the purpose of conducting a representation election.” (R. 5).

language is quoted in the House Committee reports, which state, with respect to the proposed Section 11:<sup>18</sup>

For the purpose of all hearings and investigations which in the opinion of the Board are necessary and proper for the exercise of the powers vested in it by section 9 and section 10, dealing with investigations of questions concerning the representation of employees and unfair labor practices, there is granted in section 11 the subpoena powers typically provided for similar administrative bodies, without which their work would be ineffectual. The section grants no roving commission, but is limited to the exercise of powers and functions embodied in sections 9 and 10.<sup>19</sup>

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<sup>18</sup> II *Legislative History of the NLRA, 1935*, (G.P.O., 1935), pp. 2932, 2978-2979, 3076; H. Rept. No. 969 on H.R. 7978, p. 22; H. Rept. No. 972 on S. 1958, p. 22; H. Rept. No. 1147 on S. 1958, p. 25; 74th Cong., 1st Sess.

<sup>19</sup> See also I *Leg. Hist. NLRA, 1935*, p. 1367, Comparison of S. 2929 and S. 1958, Memorandum of Mar. 11, 1935, 74th Cong., 1st Sess., p. 40:

"S. 1958 [subsequently enacted as the NLRA] provides, also, that agents of the Board may have access to, for the purpose of examination and the right to copy, evidence relating to matters under investigation. There is an identical provision in the Federal Trade Commission Act, section 9, . . . [i]n the Interstate Commerce Act (49 U.S. C. Sec. 20(5)), and in the Communications Act (sec. 220(c)). There are similar provisions in section 2(9) of the Railway Labor Act of 1934 ('the Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may

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As the Seventh Circuit observed in *Rohlen, supra*, 385 F. 2d at 57:

The crucial words [in the text of Section 11(2)] are "to produce evidence . . . or . . . give testimony touching the matter under investigation or in question." From this language, it is clear that a party can be requested, by virtue of a subpoena, "to produce evidence" concerning a "matter under investigation." When this rather obvious observation is coupled with the commonly accepted function of an investigation, the gathering of facts and information, the company's position becomes untenable. The company would read the words just quoted without the phrase "under investigation." A more appropriate reading would place primary emphasis on those words. Thus, if the material subpoenaed touches a matter under investigation, it is within the scope of section 11(2) even though the material may not be considered "evidence" as the term is employed in the courtroom.

Moreover, the list of employees names and addresses is evidence relating to a "matter . . . in question." Even if we adopt the orthodox view that evidence tends to prove or disprove the existence of a

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19 (continued)

be deemed necessary by its to carry out the purposes and provisions of this paragraph") and section 4 of the Executive order of June 28 establishing the National Steel Board ("the Board shall have access to such payrolls and other documents as will enable the Board to prepare and certify lists of employees eligible to vote in elections")."

disputed fact or something in issue, the “something in issue” in a representation proceeding under section 9 is the employee group-preference. An *Excelsior* list, by facilitating a fully informed electorate, is evidence which aids in the establishment of that group-preference.<sup>20</sup>

As *U. S. v. Morton Salt*, 338 U.S. 632, makes clear, the time is now past for judicial resistance to the full range of subpoena powers delegated by Congress to administrative agencies in aid of their statutory functions: “We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan ‘no fishing expeditions’ ” (338 U.S. at 642). But “[r]estrictions on subpoena validity were subsequently relaxed as Congress continued to delegate broad investigatory authority and courts grew more familiar with the administrative process. Thus, an agency need no longer show a probable violation before issuing a subpoena; the investigation merely must relate to some congressionally delegated function . . . .” *Resisting Enforcement of Administrative Subpoenas Duces Tecum*, 69 Yale L. J. 131, 133 (1959). Accordingly, the court below properly construed the term “evidence” in Section 11 to include payroll and employment records relevant and useful to the Board in its

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<sup>20</sup> The cases cited *supra*, n. 7, are also in accord. Contra: *N.L.R.B. v. Montgomery Ward*, 64 LRRM 2061 (M. D. Fla.) (not appealed on grounds of mootness); *N.L.R.B. v. Q-T Shoe Co.*, 67 LRRM 2356, 2359-2360 (D.N.J.) (notice of appeal to be filed when judgment is entered).

resolution of questions of representation pursuant to Section 9 of the Act.<sup>21</sup>

As a corollary to its contention that the Board's subpoena *duces tecum* calls for the production of records that are not evidence, the Company asserts that the subpoena is not entitled to enforcement because the Board intends to make the information revealed by the subpoena available to the union (Br. 12). A similar contention was made in *N.L.R.B. v. Friedman*, 352 F. 2d 545 (C.A. 3), where it was urged in defense to a Board subpoena that the Board proposed to

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<sup>21</sup> The Seventh Circuit observed in *Rohlen*, *supra*, 385 F. 2d at 58, that the more restrictive view of an administrative agency's subpoena powers expressed in *F. T. C. v. American Tobacco Co.*, 264 U.S. 298, has been obliterated by subsequent decisions of the Supreme Court. In any event, the Company's citation of *F. T. C. v. American Tobacco* is inapposite (Br. 13). The Court did not hold there that the purpose for which the administrative agency sought to compel the production of documents put those documents beyond a technical definition of the word "evidence," as the Company would suggest. Rather, the Court held that the subpoena was unenforceable because it was too broad and much of the material covered was irrelevant (264 U.S. at 306). No similar attack can be made on the breadth of the Board's subpoena in the instant case. (*Cf. Goodyear Tire & Rubber Co. v. N.L.R.B.*, 122 F. 2d 450 (C.A. 6), cited by the Company (Br. 12), an early decision placing heavy reliance on *American Tobacco*, and distinguishable on the same basis.) Finally, it should be noted that the legislative history of the Act indicates that Congress used the term "evidence," rather than "documentary evidence," in defining the subpoena powers of the Board because of the narrow construction the latter term had received in such decisions as *American Tobacco* (1 Leg. Hist. NLRA, 1935, p. 1369, Comparison of S. 2929 and S. 1958, Memorandum of Mar. 11, 1935, 74th Cong., 1st Sess., p. 41). Referring specifically to that decision, the cited memorandum concluded that the "adjective 'documentary' is therefore very restrictive and would exclude the type of records such as pay-rolls, which the Board would have most need of" (*ibid.*).

consult with union representatives in the analysis of the company records subpoenaed, and thus to give the union access to data that the company wished to keep confidential. The Court rejected this defense, stating (at 548):

No trial or administrative proceeding could pursue truth effectively if an absolute right to keep private matters confidential was conceded to all parties involved.

Appellants' vague and unspecific contention that confidential matter will be revealed is similar in scope to the one made in *F. C. C. v. Schreiber* [381 U.S. 279] . . . . There, the Supreme Court found an order forbidding disclosure of certain information to be invalid because made "without any showing that secrecy is justified" . . . . There, as here, "the naked assertion of possible . . . injury does not establish . . . [an abuse of] discretion in declining to accord confidential treatment."

For many years the Board has required "that an employer, shortly before an election, make available for inspection by the parties and the Regional Director a list of employees claimed by him to be eligible to vote in that election" (R. 7g). The required eligibility lists have of necessity been made available to participating unions to enable them to identify and challenge ineligible voters. Only the clement of employee addresses has been added to the required lists under the *Excelsior* rule, to promote full communication of election issues and timely authentication of voting eligibility. To be sure, the Board has thus enlarged the purpose for which access to eligibility lists is granted, but this is properly a subject for Board determination, not unilateral employer control.

The Company has failed to advance any substantial, legitimate interest of its own that would be compromised by making employee names and addresses available to all parties to the election proceeding; and the Board properly found that the forwarding of statutory objectives achieved by *Excelsior* would warrant the overriding of such minimal employer interests in secrecy as might exist, in favor of the public interest served by disclosure. Cf. *F. C. C. v. Schreiber*, 381 U.S. 279.

In sum, the Board's subpoena is entitled to enforcement because it was issued in a statutorily authorized proceeding to carry out objectives that Congress has entrusted to the Board, the information sought is relevant to achieving the statutory objectives, Section 11 has been broadly construed to include all such information, and no substantial employer interest has been presented that would warrant overriding of the statutory objectives served by disclosure.

### III.

#### THE DISTRICT COURT PROPERLY FOUND THAT IT ALSO HAD JURISDICTION TO ENFORCE THE BOARD'S RULE UNDER 28 U.S.C., Sec. 1337.

As an alternative to its request for subpoena enforcement, the Board asked the District Court to issue a mandatory injunction directing the Company to file the required list of employee names and addresses in compliance with the Board's *Excelsior* rule. The second count of the complaint was brought under 28 U.S.C., Sec. 1337, which provides that the district courts shall have jurisdiction "of all suits and proceedings under any law regulating commerce." This provision vests the district courts with jurisdiction to grant injunctive relief to aid administrative agencies in carrying out their

statutory functions despite the absence of any express provision authorizing such relief in their respective enabling acts. See. *Capital Service, Inc. v. N.L.R.B.*, 347 U.S. 501, 504; *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 521-524, 526-527 (dissenting opinions); *N.L.R.B. v. New York State Labor Relations Board*, 106 F. Supp. 749, 752-753 (S.D. N.Y.) and cases there cited; *U.S. v. Feaster*, 330 F. 2d 671, 674, 376 F. 2d 147, 148-149 (C.A. 5), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 88 S. Ct. 237; *Federal Maritime Commission v. Atlantic & Gulf/Panama Canal Zone*, 241 F. Supp. 766, 774-775 (S.D. N.Y.) and cases there cited. See also *Walling v. Brooklyn Braid Co.*, 152 F. 2d 938, 940-941 (C.A. 2).

The question before the court in this type of case is "Whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted" (*Walling v. Brooklyn Braid, supra*). Thus, it is well settled that the general equitable jurisdiction of the district courts extends to actions brought to carry out the public purpose despite the absence of any express statutory authority, for "there is inherent in the Courts of Equity a jurisdiction to \* \* \* give effect to the policy of the legislature."<sup>22</sup> See *I. A. M. v. Central Airlines, Inc.*, 372 U.S. 682, 690-696; *Texas & N. O. R. v. Ry. Clerks*, 281 U.S. 548, 569-570; *In re Debs*, 158 U.S. 564, 577, 584; *Shafer v. U. S.*, 229 F. 2d 124, 128 (C.A. 4), cert. denied, 351 U.S. 931; *Florida East Coast Ry. Co. v. U. S.*, 348 F. 2d 682, 684-685 (C.A. 5), aff'd on other grounds, 384

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<sup>22</sup> *Reich v. Webb*, 336 F. 2d 153, 158 (C.A. 9), cert. denied, 380 U.S. 915, quoting *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 291-292. See also *Los Angeles Trust Deed & Mortgage Exchange v. S.E.C.*, 285 F. 2d 162, 181-182 (C.A. 9) and authorities there cited, cert. denied, 366 U.S. 919.

U.S. 238, 242 n. 4. See also *United States v. West Virginia*, 295 U.S. 463, 473; *Sanitary District v. United States*, 266 U.S. 405, 425-426. Applying these principles, the Fourth Circuit held in *N.L.R.B. v. Hanes Hosiery Division, Hanes Corp.*, 384 F. 2d 188, that the *Excelsior* rule is directly enforceable by injunctive relief based on 28 U.S.C. 1337. Accord: *N.L.R.B. v. Mid-States Metal Products Co.*, *supra*, 64 LRRM 2187 (alternate finding); *N.L.R.B. v. Rohlen*, 64 LRRM 2168 (N.D. Ill.) affirmed on alternate grounds, 385 F. 2d 52 (C.A. 7)<sup>23</sup>

In its brief (pp. 14-19) the Company asserts that general grants of jurisdiction such as that involved in Section 1337 are not applicable where there is involved a specific regulatory statute with enforcement procedures (Br. 14-19). If the Company means that the Board must follow the procedures for judicial enforcement provided for in the Act where applicable, its assertion is both irrefutable and irrelevant. For example, the Board obviously could not ignore the provisions for judicial enforcement in the courts of appeals under Section 10(e) of the Act, and instead seek to enforce its unfair labor practice orders in the district courts under 28 U.S.C., Sec. 1337. But that has nothing to do with this case, for the Act does not establish a procedure under which the Board may secure direct enforcement of its election rules. Consequently, no conflict exists here between the statutory enforcement procedures and the Board's resort to the District Court under Section 1337. And the cases cited above clearly refute the Company's converse suggestion (Br. 16) that the absence of a statutory provision for

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<sup>23</sup> Contra: *N.L.R.B. v. Q-T Shoe*, *supra*, 67 LRRM at 2360-2361.

specific judicial relief warrants the inference that the agency is precluded from invoking the general equitable jurisdiction of the district courts in effectuation of its statutory powers and responsibilities. See, in particular, *Federal Maritime Commission v. Atlantic & Gulf/Panama Canal Zone*, *supra*, 241 F. Supp. at 774-775; *Walling v. Brooklyn Braid Co.*, *supra*, 152 F. 2d at 940941. See also *U.S. v. Feaster*, 330 F. 2d 671, 674 (C.A. 5). The cases cited by the Company to support its contention that the general grant of jurisdiction contained in Section 1337 does not apply where a specific regulatory statute with enforcement procedures is involved, were all suits brought by private parties to review administrative action where the regulatory statutes precluded judicial review, agency action was by law committed to agency discretion, or administrative remedies had not yet been exhausted (Br. 14-16).<sup>24</sup> Those cases in no way militate against an agency's right to seek the aid of the courts in carrying out its statutory functions where there is no countervailing Congressional intent to be overcome in establishing district court jurisdiction. Cf. *Leedom v. Kyne*, 358 U.S. 184, 190, 194; *I.A.M. v. Central Airlines, Inc.*, *supra*, 372 U.S. at 690, n. 13; *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-480.<sup>25</sup>

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<sup>24</sup> The exception is *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667 (Br. 14), which is solely concerned with the jurisdiction granted by the Declaratory Judgments Act and has no perceivable relationship to the principles in issue here.

<sup>25</sup> In *Leedom v. Kyne*, the general equitable jurisdiction of the district court under 28 U.S.C. Sec. 1337 was held to include jurisdiction to set aside a Board representation determination despite an extensive legislative history demonstrating that "Congress knew that if direct judicial review of the Board's investigation and certification

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A similar situation was presented in *U.S. v. Feaster*, 330 F. 2d 671 (C.A. 5). There the Fifth Circuit inferred district court jurisdiction to compel the production of records, for the use of the National Mediation Board in conducting a representation investigation, from a section of the Railway Labor Act providing that the Board should have access to records for this purpose, but making no provision for enforcing that right (330 F. 2d at 673, 674; 376 F. 2d at 148-149). In so holding, the court stated (330 F. 2d at 674):

[Defendants] . . . are the persons who, the Government alleges, are resisting the right of the Board to carry out the Congressional mandate.

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25 (continued)

of bargaining representatives was not barred, 'the Government [could] be delayed indefinitely before it [took] the first step toward industrial peace.' *Kyne, supra*, 358 U.S. at 192, 194 (dissenting opinion). Because of this legislative history the jurisdiction of the district courts under *Kyne* is limited to situations where the Board has acted "contrary to a specific prohibition in the Act" and where " 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given.'" 358 U.S. at 188, 190. See *Boire v. Greyhound, supra*, 376 U.S. at 480-481. There is no countervailing legislative policy to be overcome in establishing district court jurisdiction over the present action. Rather, the Board is seeking the aid of the courts in carrying out the Congressional intent that questions of representation be promptly resolved under the procedures adopted by the Board for conducting fair and free employee elections. This distinction is made particularly clear in *U. S. v. Feaster*, 376 F. 2d 147, 148-149, 150-151, nn. 1, 2, 4 (C.A. 5), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 88 S. Ct. 237.

The district court has the power to consider the complaint and if it determines that these defendants are, in fact, in custody of the records, it has the power to enjoin their conduct which denied the access to them which Congress provides the Mediation Board shall have.

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We think the absence of subpoena power and the absence of a specific enactment in the statute providing that the United States or the Board may file suit to enforce the Board's right to access to the records is not dispositive of the case [citing *Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192; *Virginia R. Co. v. System Federation*, 300 U.S. 515].

So here, Section 9(c) of the Act gives the Board power to establish rules for the conduct of fair employee elections, and the aid of the District Court was enlisted to make that function effective.<sup>26</sup> Accordingly, the District Court properly

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<sup>26</sup> If the Board were remitted solely to the sanction of setting aside elections in which its rule was not complied with, a persistent noncompliance could block a valid election indefinitely, or delay it at will, in contravention of the Congressional policy in favor of the prompt resolution of questions of employee representation. The Company argues that the Board could also enforce its *Excelsior* rule by finding the refusal to comply with the rule a violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights (Br. 17-19). But the Board has not yet had occasion to determine whether failure to comply with *Excelsior* constitutes a violation of Section 8(a)(1). When that occasion does arise,

(continued)

found that it had jurisdiction under 28 U.S.C., Sec. 1337 to enforce the *Excelsior* rule, adopted by the Board in the valid exercise of broadly delegated Congressional authority and responsibility.

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26 (continued)

the Board should be free to decide the issue on the merits; it should not be compelled to find a violation in order to provide itself with a means for enforcing its election rule. As the Board noted in *Excelsior*, the considerations involved in regulating elections are different from those involved in administering the unfair labor practice provisions of the Act. The test of conduct which may interfere with the "laboratory conditions" for an election is considerably broader than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1) (R. 70, citing *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787; and *General Shoe Corp.*, 77 NLRB 124, 126-127). See *N.L.R.B. v. Shirlington Supermarket, Inc.*, 224 F. 2d 649, 652 (C.A. 4), cert. denied, 350 U.S. 914. See also *N.L.R.B. v. Fresh'nd-Aire Co.*, 226 F. 2d 727, 741 (C.A. 7); *Kearney & Trecker Corp. v. N.L.R.B.*, 210 F. 2d 852, 858-859 (C.A. 7), cert. denied, 348 U.S. 824. Moreover, where a court can give relief, there is no ground for withholding it on the speculation that relief could be obtained by some other method. *American Life Insurance Co. v. Stewart*, 300 U.S. 203, 214. Thus, whether the Board ultimately determines that refusal to comply with its *Excelsior* rule violates Section 8(a)(1) or not, that rule is entitled to enforcement, in its own right, now.

## CONCLUSION

For the foregoing reasons we respectfully submit that the District Court properly ordered the Company to file with the Regional Director the names and addresses of the employees in the unit, in compliance with the *Excelsior* rule and the Board's subpoena.

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February 1968.

## CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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